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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KESHAWN THOMAS, Defendant and Appellant.	F078649 (Super. Ct. No. F15907476) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Hamlin, Judge.

Jean M. Marinovich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Clara M. Levers and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Keshawn Thomas appeals from an order denying his request for a sentence reduction as permitted by Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate

[*]Before Levy, Acting P.J., Peña, J. and Meehan, J.

Bill 620), which gives trial courts discretion to "strike or dismiss" firearm use enhancements in the interest of justice pursuant to Penal Code section 1385. (*Id.*, §§ 12022.5, subd. (c), 12022.53, subd. (h); all further statutory references are to the Penal Code.) Defendant's sentence includes an enhancement under section 12022.53, subdivision (d), which added a prison term of 25 years to life to a mitigated base term of five years for attempted murder. The trial court is alleged to have been unaware of its authority to replace the original enhancement with a lesser included, but uncharged, enhancement under section 12022.53, subdivision (c). Recently, in *People v. Tirado* (2019) 38 Cal.App.5th 637 (*Tirado*), our district concluded no such authority exists. We will follow *Tirado* and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2016, a jury convicted defendant of attempted murder (§§ 187, 664; count 1), assault with a semiautomatic firearm (§ 245, subd. (b); count 2), and attempted robbery (§§ 211, 664; count 3). Firearm enhancement allegations under section 12022.53, subdivision (d) were found true in relation to counts 1 and 3. A firearm enhancement allegation under section 12022.5, subdivision (a) was found true in relation to count 2. No additional enhancements were alleged.[1]

In April 2016, defendant was sentenced to an aggregate prison term of 30 years to life based on the lower term of five years for count 1 plus the enhancement under section 12022.53, subdivision (d). Punishment for count 2 was stayed (§ 654) and a concurrent prison term was imposed for count 3. The trial court emphasized it had no discretion regarding the imposition of a life term under California's "Use a gun and you're done" law, i.e., section 12022.53.

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[1]Defendant's unopposed request for judicial notice of the appellate record in case No. F073552, which contains the underlying criminal information, is granted. Initially, count 1 also alleged personal infliction of great bodily injury for purposes of section 12022.7, subdivision (a), but the allegation was dismissed before the case was submitted to the jury.

Defendant filed an appeal, which was pending when Senate Bill 620 took effect in January 2018. The legislation amended sections 12022.5 and 12022.53 to allow trial courts, "in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss [a firearm] enhancement otherwise required to be imposed …." (§§ 12022.5, subd. (c), 12022.53, subd. (h).) This court affirmed defendant's convictions but concluded Senate Bill 620 applied retroactively to his case. (*People v. Thomas* (Sept. 13, 2018, F073552) [nonpub. opn.] (*Thomas I*).) Accordingly, the matter was remanded to allow the trial court to consider exercising its expanded sentencing discretion under sections 12022.53, subdivision (h), and 1385.

On January 3, 2019, the trial court conducted further proceedings and declined to modify the sentence. Its reasoning is clearly stated in the record:

> "… If I had the discretion to sentence [defendant] to a 12022.53(c) enhancement on Count 1, I would consider granting the request … and sentence him to up to 29 years determinate. Neither the statute nor any reported case I have found, nor [the opinion in *Thomas I*,] tells me that I have that discretion. And if I were limited in my available sentence by striking the 12022.53(d) enhancement to Count 1 to impose 19 years determinate as the maximum sentence, I would find that that is an inappropriate exercise of discretion.…
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> "So for what it's worth, the Court declines to exercise its discretion under 1385 with the understanding that it cannot replace the enhancement with a lesser enhancement not found by the jury even though the facts found by the jury, per their verdict[,] support that lesser enhancement. And if the Court of Appeal[] feels that I can, in fact, impose that lesser enhancement, this case should be remanded to me to exercise that discretion, but I decline to exercise discretion under my understanding of this code section, and what little case law there is that interprets it to this point. The Court [of Appeal] says I could strike the enhancement and impose a different sentence. It says nothing about modifying the enhancement, imposing a lesser enhancement, and I decline to strike the enhancement if my only discretion is to drop to a sentence of 13, 16, or 19 years determinate."

DISCUSSION

"Relief from a trial court's misunderstanding of its sentencing discretion is available on direct appeal when such misapprehension is affirmatively demonstrated by the record." (*People v. Leon* (2016) 243 Cal.App.4th 1003, 1026.) Defendant contends the trial court did not realize that "[a]uthorization to strike an enhancement necessarily implies discretion to substitute a lesser-included one," regardless of whether the lesser enhancement was actually charged. This argument mirrors the holding of *People v. Morrison* (2019) 34 Cal.App.5th 217 (*Morrison*), which defendant asks us to follow. Respondent claims *Morrison* was wrongly decided.

In *Morrison*, Division Five of the First District Court of Appeal concluded trial courts have "discretion to impose an enhancement under section 12022.53, subdivision (b) or (c) as a middle ground to a lifetime enhancement under section 12022.53, subdivision (d), if such an outcome [is] found to be in the interests of justice under section 1385." (*Morrison, supra,* 34 Cal.App.5th at p. 223.) The *Morrison* court relied on cases such as *People v. Fialho* (2014) 229 Cal.App.4th 1389, 1395–1396, which authorize trial courts to "impose a 'lesser included' enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence." (*Morrison*, *supra*, at p. 222.) Although resentencing under Senate Bill 620 occurs in a different context, namely without any issues of evidentiary insufficiency, *Morrison* finds no legal impediment to applying the same general principle. (*Morrison*, at pp. 224–225.)

Our district analyzed the issue differently in *Tirado*. Whereas the *Morrison* analysis is rooted in pragmatism, *Tirado* focuses on statutory construction and legislative intent. (*Tirado*, *supra*, 38 Cal.App.5th at pp. 642–644.) The appellate panel in *Tirado* reached these conclusions: "Nothing in the plain language of sections 1385 and 12022.53, subdivision (h) authorizes a trial court to substitute one enhancement for another. Section 12022.53, subdivision (h) uses the verbs 'strike' and 'dismiss,' and

section 1385, subdivision (a) states the court may 'order an action to be dismissed.' This language indicates the court's power pursuant to these sections is binary: The court can choose to dismiss a charge or enhancement in the interest of justice, or it can choose to take no action. There is nothing in either statute that conveys the power to change, modify, or substitute a charge or enhancement." (*Id*. at p. 643.) "Had the Legislature intended to grant the trial court the power to modify or reduce a firearm enhancement, it would have done so with express language." (*Ibid*.)

We subscribe to the view expressed in *Tirado* and disagree with the holding of *Morrison*. Accordingly, we conclude the trial court's stated understanding of the law was correct. There are no grounds for reversal.

DISPOSITION

The judgment is affirmed.